BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHY S. GOODALE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,190
FEDERAL EXPRESS	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the May 12, 2006 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits in the form of authorized medical care and temporary total disability benefits, if taken off work by the authorized treating physician, after the Administrative Law Judge (ALJ) found that claimant had proven that she suffered accidental injury arising out of and in the course of her employment with respondent and that she had given timely notice of the accident.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment with respondent?

2. Did claimant provide timely notice of accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be reversed.

This matter originally went before the ALJ at a preliminary hearing on October 11, 2005. In the corresponding December 1, 2005 preliminary hearing Order, the ALJ awarded benefits after finding claimant had proven that she suffered accidental injury arising out of and in the course of her employment, and had provided notice of the accident in a timely fashion.

That Order was timely appealed to the Board, which reversed the ALJ, finding that claimant had not proven that she had suffered an accidental injury arising out of and in the course of her employment.

Claimant then filed for another preliminary hearing and went before the ALJ on May 2, 2006, at which time the ALJ again awarded benefits. That is the matter before the Board at this time.

Claimant began working for respondent as a box handler in February of 2004. She first began experiencing symptoms in her right upper extremity when she awoke one morning with pain in her right wrist. She described the pain as excruciating, and testified that it hurt all the time, regardless of what activity was involved. It did not matter if she was bathing her children, opening a trunk or doing anything that required her to twist her wrist. This also included activities while employed with respondent.

Claimant testified that she discussed her wrist problems with co-workers Tasha and Marti and also with a ramp agent in training named Edward Robinson. Claimant thought Mr. Robinson was her supervisor, although Mr. Robinson testified that he had no supervisory responsibilities or authority over claimant or any of the other handlers. Claimant testified that she talked to Mr. Robinson because he was wearing a splint and told claimant that he suffered from tendinitis. Claimant told Mr. Robinson that she also suffered from tendinitis.

Claimant also testified that she talked to John Renecker, her boss. She did not tell him that she had suffered a work-related injury and at no time did she request that Mr. Renecker or any other representative of respondent provide her with medical care for her alleged injury. Respondent alleges that the first notice provided by claimant occurred on July 19, 2005, when respondent received a letter from claimant's attorney.

Claimant first sought medical treatment with Tobie R. Morrow, D.O., her family doctor. When claimant saw Dr. Morrow on April 13, 2005, she advised Dr. Morrow that she worked at a job which required repetitive activities, but went on to advise Dr. Morrow that she "cannot relate any known injuries to work."[1] Dr. Morrow's instructions indicated that claimant was to wear a wrist brace at work, an instruction claimant ignored.

Claimant was referred by Dr. Morrow to Steven Leonard, D.C., for chiropractic care. The chiropractic notes of April 19, 2005, ask, in the history form, whether claimant's condition arose out of her employment. That question was answered with a question mark. The notes go on to state that claimant "woke up with it one morning – not really sure".[2]

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[1] P.H. Trans. (Oct. 11, 2005), Cl. Ex. 1 (Dr. Morrow's office notes of April 13, 2005).

[2] P.H. Trans. (Oct. 11, 2005), Cl. Ex. 2 at 5.

On April 21, 2005, claimant presented Mr. Renecker with a handwritten notice of termination, advising that she would terminate her employment with respondent in two weeks. The note made no mention of any work-related problems. Claimant voluntarily terminated her employment on May 6, 2005.

Claimant testified that sometime after leaving respondent's employment, she was tucking a shirt into her pants when her wrist popped. She again experienced excruciating pain and felt that she had gone back to square one with the wrist. It was at that point that claimant decided to file a workers compensation claim.

When claimant testified at the preliminary hearing on May 2, 2006, she described two incidents when her wrist popped at work. This testimony was not contained in the original preliminary hearing testimony from October 11, 2005.

Claimant was referred to George G. Fluter, M.D., of Advanced Anesthesia Associates and Pain Management on January 10, 2006. Dr. Fluter diagnosed claimant with right de Quervain's tenosynovitis. In his followup report of February 24, 2006, Dr. Fluter stated, within a reasonable degree of medical probability, that there is a causal/contributory relationship between claimant's current condition and her work-related activities. This opinion was also not available at the first preliminary hearing.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The Kansas legislature has clearly expressed an intent to liberally construe the Act for the purpose of bringing employers and employees within the provisions of the Act to provide the protections of the Workers Compensation Act to both.[5]

In this matter, claimant testified to her wrist popping while at work. Additionally, Dr. Fluter's opinion of a causal/contributory relationship between the current condition and claimant's work convinces the Board that claimant did suffer accidental injury arising out of and in the course of her employment.

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[3] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[4] K.S.A. 44-501(a).

[5] K.S.A. 44-501(g).

Respondent contends that claimant failed to provide timely notice of her accident. K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

In this instance, claimant alleges she told Mr. Robinson, whom she thought was her supervisor, of the accident. However, Mr. Robinson testified that he had no supervisory responsibilities over claimant. The Board has answered this question in the past. In *Burditt*,[6] the claimant told a Ms. Bybee, whom she thought was her supervisor, of a work-related injury. Ms. Burge, the co-owner, testified that Ms. Bybee had no supervisory responsibility over the claimant. Also, Ms. Burge was at the establishment seven days a week and was available on many occasions to discuss the injury, had the claimant been so inclined. There was no indication in that record that the claimant had been told that Ms. Bybee was her supervisor. The Board found the claimant in *Burditt* failed to provide timely notice of injury.

In *Lawson*,[7] the claimant telephoned a night clerk regarding an alleged work-related injury to her shoulder. That record contained no evidence that the night clerk was claimant's supervisor. The Board found claimant had failed to prove that she provided timely notice, based only on a mistaken belief regarding the identity of her supervisor.

The purpose of K.S.A. 44-520 is to afford the employer an opportunity to investigate an accident and to furnish prompt medical treatment.[8] Here, claimant alleges notice to a ramp agent in training. While claimant thought Mr. Robinson had supervisory responsibility over her, he testified that he did not. Additionally, claimant comparing with Mr. Robinson their similar problems does not appear to have been intended to be notice of an accident or done for the purpose of reporting a work-related injury. Finally, when claimant had the opportunity to inform her boss, Mr. Renecker, she failed to do so. The Board finds that claimant has failed to prove by a preponderance of the credible evidence that notice was provided to respondent within 10 days of the accident.

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the

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[6] *Burditt v. Coy Burge Oil Company, Inc.*, No. 189,625, 1994 WL 749427 (Kan. WCAB Dec. 13, 1994).

[7] *Lawson v. Howard Johnson Motel*, No. 205,077, 1995 WL 781814 (Kan. WCAB Dec. 29,1995).

[8] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P. 2d 1055 (1978).

> notice required by this section is given to the employer within 75 days after the date of the accident . . . .

Claimant failed to provide any evidence that the failure to notify respondent of the accident was due to just cause. The Board, therefore, finds that claimant has failed to prove just cause, so as to extend the notice period to 75 days. The Board reverses the award of benefits in this matter.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 12, 2006, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent